

<sup>1</sup> For final Office decisions issued prior to November 19, 2008, a claimant had up to one year from issuance to file an appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2008). For final Office decisions issued on and after November 19, 2008, a claimant has 180 days from issuance to file an appeal to the Board. 20 C.F.R. § 501.3(e) (2009). For computation of time purposes, the 180-day period for determining jurisdiction begins on the day following the date of the Office's decision. 20 C.F.R. § 501.3(f)(2). As the Office's decision was issued April 22, 2009, the 180-day computation began on April 23, 2009. Using October 21, 2009, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights; therefore, the date of the October 16, 2010 postmark is considered the date of filing from the April 22, 2009 decision. 20 C.F.R. § 501.3(f)(1).

was created in the amount of \$43,444.28 based on the forfeiture; (3) whether the Office properly found that appellant was at fault in creating the overpayment, thereby precluding waiver; and (4) whether the Office properly directed recovery of \$150.00 from appellant's continuing compensation payments.

On appeal, appellant, through counsel, contends that she reported her employment and earnings as a teaching assistant to the Office and that it failed to establish forfeiture.

### **FACTUAL HISTORY**

On May 6, 2003 appellant, then a 37-year-old letter carrier, sustained injury when she was shot in the face by a BB gun while making a delivery. The Office accepted her claim for a left cheekbone contusion and acute stress reaction. Appellant was placed on the period rolls in receipt of compensation for wage-loss and medical benefits.

As appellant was unable to return to work full time at the employing establishment, the Office referred her for vocational rehabilitation in April 2004. After a transferable skills analysis, paraprofessional training to prepare her to become a teacher's assistant was identified. Karen Davis, the rehabilitation counselor, noted that there would be a decrease in wages earned when compared to appellant's salary when injured. On April 20, 2005 she noted that appellant would begin classes at Northern Rhode Island Collaborative as of April 28, 2005.<sup>2</sup> Fred Price, an Office rehabilitation specialist, approved the training program. Appellant completed training and a paraprofessional assessment test and job placement efforts were undertaken as of January 9, 2006. On March 4, 2006 Ms. Davis noted that appellant had been called to substitute three to four times in a three-week period and was speaking to several employers about full-time work, six hours a day. She noted that appellant wanted to report her income to the Office claims examiner and Ms. Davis provided her information with instruction to mail copies of her pay slips to the claims examiner.

On June 6, 2006 Ms. Davis reported that appellant worked for several weeks as a temporary full-time substitute teacher. Appellant had recently been called back by the North Smithfield Schools and would continue to work until the end of the school year. Ms. Davis advised that appellant would pursue full-time permanent employment in the fall. The record reflects that appellant submitted copies of her pay slips dated February 17 through May 26, 2006 to the Office. She earned a total of \$1,064.23 in May 2006. They reflect that appellant had received a total income of \$3,079.42 through May 26, 2006. Mr. Price authorized continuing job placement services through June 28, 2006, noting that appellant would have an estimated yearly salary of \$15,000.00 to \$18,000.00. Ms. Davis reported that appellant had submitted all her pay stubs to the Office.

On July 10, 2006 appellant completed an EN-1032 form. She noted that in the past 15 months she was not employed in any capacity but had received payment from the employing establishment for the balance of unused vacation time. On August 22, 2006 appellant submitted pay slips for June 2006 totaling \$1,183.29. A notation on the form stated, "This is all my earning

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<sup>2</sup> Ms. Davis noted that appellant was restricted to working only six hours a day and that work as a teacher's assistant would fit this requirement.

for the month of June.” Total year-to-date earnings were listed in the amount of \$4,438.80. On July 5, 2007 appellant completed a new EN-1032 form. She reported earnings from September 2006 through June 2007 in the amount of \$4,683.25 for work as a substitute teacher’s assistant.

In an August 10, 2007 letter, the Office notified appellant that she had received compensation for total disability while she had earnings as a teacher’s assistant or substitute from March 2006 to June 2007. It requested that she submit additional wage information, noting that an overpayment had been created.

Social Security Administration records indicate that for 2005 appellant received \$1,677.13 from the employing establishment. In 2006, appellant received \$5,280.33 from North Smithfield School Department. This figure coincides with a W-2 form she submitted from the North Smithfield School Department for 2006.

On October 22, 2007 the Office found that appellant’s actual earnings as a teacher’s assistant with wages of \$101.54 a week fairly and reasonably represented her wage-earning capacity. It reduced her wage-loss benefits to reflect an 11 percent wage-earning capacity.<sup>3</sup>

By decision dated November 12, 2008, the Office found that appellant forfeited her entitlement to compensation from April 11, 2005 through July 10, 2006 for failing to report her earnings on the Form CA-1032 signed on July 10, 2006. It also made a preliminary determination that she was at fault in the creation of an overpayment in the amount of \$43,444.28 because she did not report her earnings as a substitute teacher on the CA-1032 form.<sup>4</sup> The Office found that her failure to report her earnings forfeited all entitlement to compensation for 15 months prior to when she signed the CA-1032 form from April 11, 2005 through July 10, 2006. It forwarded an overpayment recovery questionnaire and advised appellant as to her right to request a prerecoupment hearing and submit additional evidence pertaining to the overpayment and fault finding.

On December 10, 2008 appellant requested a telephone conference with regards to the overpayment. She disagreed that an overpayment occurred, the amount of the overpayment and that she was not at fault in the creation of the overpayment. Appellant submitted financial documentation. She stated that she did not know she was being overpaid because she sent her pay slips to the Office each month. A prerecoupment hearing was held by teleconference on March 24, 2009.

In an April 22, 2009 decision, the Office finalized the overpayment in the amount of \$43,444.28 for which appellant was at fault and not eligible for waiver. It directed that \$150.00 would be withheld from her continuing compensation payments beginning June 6, 2009.

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<sup>3</sup> In an October 29, 2008 decision, the Office found an overpayment of compensation in the amount of \$1,405.20 from September 1, 2006 through August 9, 2007. There was no appeal from this decision.

<sup>4</sup> The Office noted that appellant received compensation payments in the amount of \$565.93 from April 11 to 16, 2005, \$42,683.14 from April 17 to July 8, 2006, and \$195.21 from July 9 to 10, 2006, for a total of \$43,444.28.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who fails to make an affidavit or report when required or knowingly omits or understates any part of her earnings, forfeits her right to compensation with respect to any period for which the affidavit or report was required.<sup>5</sup> While earning income will not necessarily result in a reduction of compensation, failure to report income may result in forfeiture of all benefits paid during the reporting period.<sup>6</sup>

Pursuant to 20 C.F.R. § 10.525, an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part time or full time.<sup>7</sup> If an employee knowingly omits or understates any earnings or work activity in making a report, she shall forfeit the right to compensation with respect to any period for which the report was required.<sup>8</sup> A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.<sup>9</sup> Forfeiture results in an overpayment of compensation for the period of the forfeiture and is subject to recovery under 5 U.S.C. § 8129.<sup>10</sup> The Board has held that forfeiture, being a penalty provision, will be narrowly construed.<sup>11</sup>

### **ANALYSIS -- ISSUES 1**

Appellant's claim was accepted by the Office for a facial injury and emotional reaction to being shot by a BB gun while on her postal route. The record reflects that she was referred for vocational rehabilitation and received training as a teacher's assistant pursuant to directions from the Office's rehabilitation specialist and her assigned vocational counselor. Upon successful completion of appellant's program, she received job placement services from the Office. Appellant's sporadic earnings as a temporary substitute teacher were noted in reports to the Office. The record also reflects that she forwarded her pay slips to the Office claims examiner.

The Office found that appellant forfeited her right to compensation from April 11, 2005 through July 10, 2006 as she failed to report her earnings on a CA-1032 form she signed on July 10, 2006. Based on this forfeiture, the Office found an overpayment in the amount of \$43,444.28. The Board finds that the Office erred in finding that appellant forfeited her right to compensation for this period.

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<sup>5</sup> 5 U.S.C. § 8106(b)(2).

<sup>6</sup> 20 C.F.R. § 10.525(b).

<sup>7</sup> *Id.*

<sup>8</sup> 5 U.S.C. § 8106(b); 20 C.F.R. § 10.529(a). Knowingly means with knowledge, consciously, willfully or intentionally. 20 C.F.R. § 10.5(n).

<sup>9</sup> 20 C.F.R. § 10.529(a).

<sup>10</sup> *Supra* note 8; *id.* at § 10.529(b).

<sup>11</sup> *Karen Spurling*, 56 ECAB 189 (2004); *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

The Board finds that the Office applied an erroneous standard of review in determining that appellant knowingly failed to report her earnings from employment as required on the form CA-1032 of 2006. The only mention of the fact that appellant had earnings as a substitute teacher is stated in the November 12, 2008 decision as follows:

“Although the claimant provided the [O]ffice with copies paycheck stubs on three occasions she did not report her earnings on CA-1032 form in July 2006. The [O]ffice did not take the necessary actions to recompute the claimant’s appropriate entitlement to compensation based on her outside earnings until June 2007. [Its] error in issuing compensation checks following a claimant’s return to work does not excuse the claimant’s acceptance of such compensation. A claimant is at fault if he or she accepts compensation checks after returning to work.” (Emphasis and citation omitted.)

In finding that appellant forfeited her entitlement to compensation under section 8106(b) of the Act for omitting or understating her earnings, the Office intermingled the standard for determining fault in an overpayment under section 8129 with the “knowingly” standard of review applicable in this case. Appellant can only be subjected to the forfeiture penalty if she “knowingly” failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. Section 8106(b) of the Act is a penalty provision and as such will be narrowly construed.<sup>12</sup> The Board finds that the Office did not adequately support its determination of forfeiture in this case as it relied upon an erroneous standard of review.<sup>13</sup>

Moreover, from the totality of the circumstances involved, it cannot be said that appellant failed to document her temporary employment activities or sporadic earnings to the Office. The contemporaneous reports of Ms. Davis and Mr. Price establish that appellant kept the Office informed as to her work as a temporary substitute teacher beginning in Spring 2006 and of her earnings. On March 14, 2006 Ms. Davis noted that appellant had several job leads and was provided the address of the Office claims examiner to forward copies of pay slips so that he had a record of her work. Similar pay information dated February through June 2006 was submitted to the Office. On June 6, 2006 Ms. Davis advised the Office that appellant was working full time as a substitute, but reiterated that such work was only temporary. She noted that appellant had submitted pay slips to the claims examiner and that no adjustment had yet been made to her monthly compensation.

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<sup>12</sup> *Christine P. Burgess, supra* note 11.

<sup>13</sup> General reference to section 8106(b)(2) of the Act as contained elsewhere in the decision does not cure the deficiency in the analysis of that section of the Act to the evidence of record.

On June 26, 2006 Mr. Price, the Office rehabilitation specialist, noted appellant's return to work as a full-time, temporary teacher's aide and her earnings. Additional pay information was received into the case record. On July 6, 2006 Mr. Price noted that appellant had been employed for 60 days, but was laid off for the summer with a planned return to work in the fall.<sup>14</sup>

As noted by counsel on appeal, Office personnel were fully aware and assisted in appellant's job search and placement within a local school district, temporary work activities and earnings from employment. There is no evidence of any concealment or misrepresentation; rather, the record establishes that appellant cooperated with and benefited from vocational rehabilitation and was successfully placed in the private sector at work consistent with her restrictions and limitations. Since the Board finds that the Office failed to meet its burden of proof to establish forfeiture in this case, the April 22, 2009 overpayment based on the forfeiture determination will also be reversed. As noted, forfeiture is a penalty provision which the Board will narrowly construe.<sup>15</sup> The disposition of the forfeiture issue renders the remaining issues in this case moot.

### **CONCLUSION**

The Board finds that the Office did not establish that appellant forfeited her right to compensation. The Board further finds that Office erroneously found an overpayment of \$43,444.28 based on the forfeiture from April 11, 2005 to July 10, 2006.

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<sup>14</sup> As the work was temporary and earnings sporadic, a wage-earning capacity determination could not be made; but the record does not explain why the Office did not deduct appellant's earnings from employment against her wage-loss compensation. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d) (December 1995).

<sup>15</sup> *Karen Spurling, supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 22, 2009 and November 12, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: December 14, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board